Evacuation powers of emergency workers and emergency-service organisations in Australia

Loh outlines the powers of ESOs to force evacuations during fire emergencies

Abstract

Every Australian State and Territory has adopted the Australasian Fire Authorities Council's 'Prepare, Stay and Defend or Leave Early' policy (the Policy) which outlines how emergency service organisations (ESOs) and their members should respond to fire emergencies. As emergency response in Australia falls within State/Territory jurisdiction, the powers given to ESOs and their members differ in each jurisdiction which means the implementation of this nationally recognised Policy will also be different in each State and Territory. How it will be implemented will depend in part on the common law and in part on what powers (in particular evacuation powers) are provided to them by their respective State/Territory legislation. This paper summarises the powers of ESOs and their members to forcibly remove people from their homes for each State and Territory in Australia. Victoria is generally described as having a pecuniary interest evacuation model and the other States and Territories as having the mandatory evacuation model. As described in the paper, such a dichotomy is simplistic.

Introduction

The Australasian Fire Authorities Council (AFAC)'s *Position Paper on Bushfires and Community Safety* issued on 28 November 2005 which encapsulates the "Prepare, Stay and Defend or Leave Early" policy (the Policy) emphasises that in the face of a bushfire threat, the safest option is often for people to remain in their homes. This is in recognition of the fact that people who stay with their homes are able to (i) be protected from the radiant heat of the oncoming fire and (ii) take defensive measures to save their homes from being destroyed by the fire, such as by extinguishing any embers that may fall on the house. Otherwise, residents should leave early, long before the fire danger arrives, if they feel they are unable to protect their homes because of physical impairment or lack of preparedness. The policy is in recognition that the most dangerous option for the evacuee is to undertake a last minute evacuation through the fire front. Most houses are lost due to ember attack which can be controlled by able-bodied people in the building (Handmer and Tibbits, 2005, p.81).

Emergency service organisations (ESOs) and their members are given different powers by the relevant State laws. In particular, legislation in different States and Territories give ESOs and their members different 'types' of evacuation powers. What the Policy highlights, however, is that regardless of the 'type' of evacuation powers given to ESOs and their members by legislation, the decision to evacuate is in fact a discretionary choice of the ESO officer and the victim. As proposed by the Policy, ESOs should sometimes not exercise their evacuation powers as it may be safer in some circumstances not to evacuate, especially when it is to be undertaken in the 'last minute'. However, should ESOs decide that evacuating the public is the most appropriate response to a dangerous fire situation, it must then be carried out early in accordance with the Policy when the threat of the fire is not imminent. In exercising their powers of evacuation, it is important that ESOs and their members take into consideration the extent of their evacuation powers as provided to them by legislation. This paper summarise the powers of ESOs and their members to forcibly remove people from their homes in Australia in order to clarify what ESOs and their members should or should not do if it was decided that evacuation is the best course of action to take. It does not summarise the entire area of emergency law (eg. related legal liabilities) or cover the powers of ESOs and their members over Crown land (eg. State forests, national parks, public land).

Powers to evacuate

There are generally two different types of evacuation models used to describe the evacuation powers of emergency workers. The terms "pecuniary interest evacuation model" and "mandatory evacuation model" are often used to describe the different situations when forced evacuation is or is not allowed (Karanev, 2001, p.21). The pecuniary interest evacuation model is where a person can refuse an order to evacuate on the basis of her or his pecuniary interest in land, building or goods in it. A pecuniary interest is a property right that can include goods and chattels. It is based on a principle that dates back to the Middle Ages which asserts that a person who is not a felon or is unlikely to act unlawfully can freely enjoy her or his property rights unencumbered by the state (*Balfour*, 1919, at 579). It is on this basis that an order to evacuate could historically be lawfully refused.

This right to refuse an order to evacuate has however been overridden in most States and Territories in Australia. The situation in these States and Territories is described as the 'mandatory evacuation model' as it is mandatory for a person to obey orders to evacuate despite having a pecuniary interest in the land. The pecuniary interest evacuation model is generally said to persist in Victoria with the mandatory evacuation model applying to the other States and Territories (being New South Wales, South Australia, Tasmania, Queensland, Australian Capital Territory, Western Australia and Northern Territory) (Karanev, 2001, p.21). As shown below, such a dichotomy is, however, simplistic.

State/Territory specific legislative powers

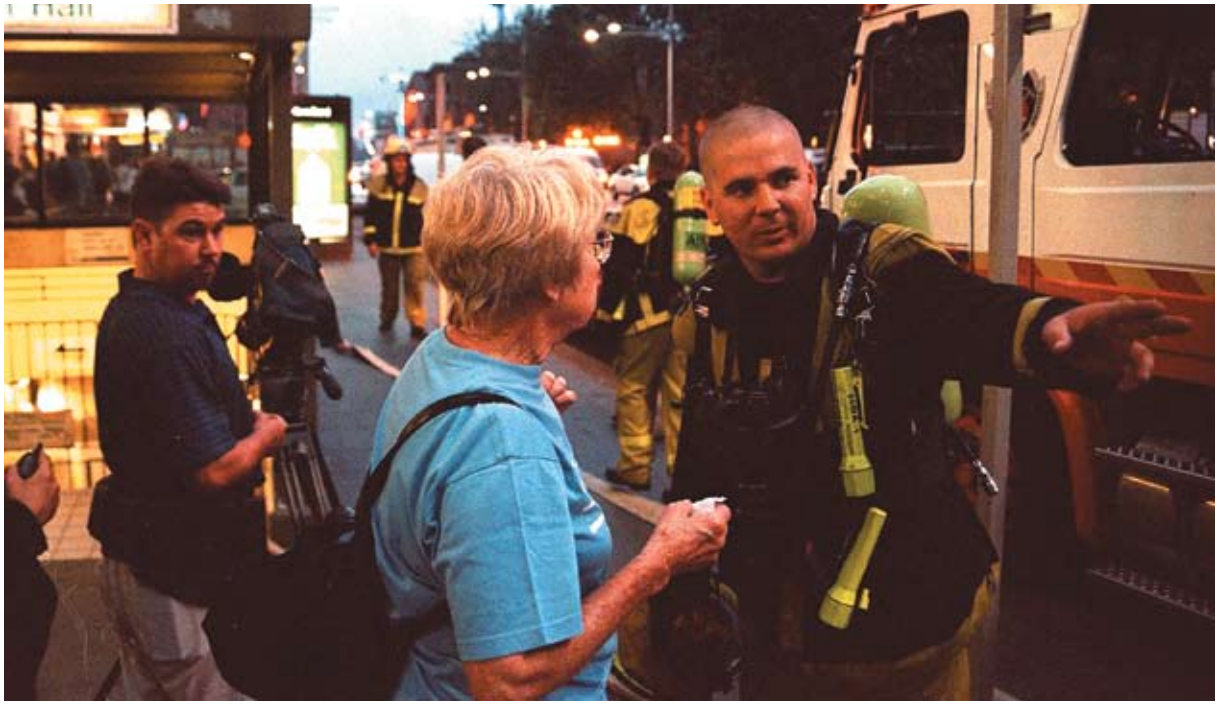
The following section summarises the various powers related to evacuation in our states and territories.

A. Victoria

The Chief Officer of the Country Fire Authority ("CFA") may only remove (or order a member of the CFA to remove) a person from an area if the person is interfering with fire-fighting operations and only if that person does not have a pecuniary interest in the relevant land, building or goods in it. This is also the case for police officers within the country area acting within the *Country Fire Authority Act* 1958 (Vic).

Members of the Metropolitan Fire Brigade and police officers within a metropolitan area may only forcibly remove a person if they do not have a pecuniary interest in the land, building or goods in it. Police officers may use force to remove a person regardless of pecuniary interest (members of MFB may 'cause' such a person to be removed) if they are interfering with brigade operations within a metropolitan area and where there has been an 'alarm of fire'.

The Coordinator in Chief of Emergency Management may compel a person to evacuate from a declared 'disaster area' (as declared under section 23 of the *Emergency Management Act* 1986 (Vic)) once a declaration of a state of disaster or emergency has been made but only if they do not have a pecuniary interest. Forced evacuations most often involve interference to the evacuee's body by the rescuer which, if unlawful,



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Under the "mandatory evacuation model" it is mandatory for a person to obey orders to evacuate.

is effectively an assault. As assault is a serious matter, courts may be reluctant to find an implied power to use force and only find that force can be used where legislation clearly allow for it.

The *Emergency Management Act* 1986 (Vic) allows police officers to direct a person who is out in the open or in a vehicle to leave the 'emergency area' (as declared by the most senior police officer under section 36A of the *Emergency Management Act* 1986 (Vic)) immediately. 'Reasonably necessary force' may only be used to remove persons if it is suspected that an offence against the Act is being committed. Otherwise, force may not be used. Persons with pecuniary interests may however be prohibited from entering their property and persons with pecuniary interests who are already on the property may have a condition placed on their staying. It is unclear if force can be used to remove such persons when the conditions placed on their staying are not met.

B. Australian Capital Territory (ACT)

In all circumstances, whether a state of emergency has been declared or not, it appears that statutory powers privilege emergency response operations over the pecuniary interests of the owners. Nevertheless, though it is an offence for a person not to follow directions to leave a fire-affected area, the legislation does not empower fire-fighters or emergency workers to actually use force to remove people from an area unless it can be shown that they are interfering with fire-fighting operations. The legislation only empowers fire-fighters and emergency workers to 'direct' persons to leave an area during fires and to 'direct' (and/or give directions to regulate and prohibit) movements of persons during a state of emergency (see *Emergencies Act* 2004 (ACT) s67(2)(b), 68(2)(b), s163(2)(a) and (b)). It is unclear whether force could be use in performing the function of 'directing' persons.

C. New South Wales (NSW)

Forced evacuations are only clearly allowed in NSW when a state of emergency has been declared by the Premier or when an area has been declared a "disaster area" by a senior police officer. During a 'state of emergency' (as declared by the Premier of NSW in accordance with section 33 of the *State Emergency and Rescue Management Act* 1989 (NSW)), only authorised "emergency service officers" may forcibly evacuate people irrespective of their pecuniary interests in the land, building or goods and only a senior police officer or an officer who has been authorised by a senior police officer may forcibly evacuate people in a specified 'disaster area' (defined in section 60KA of the *State Emergency and Rescue Management Act* 1989 (NSW) as 'the area specified by a senior police officer as the area in which an emergency is causing or threatening to cause injury or death').

Where there has not been a state of emergency or a disaster area declared (or a person interfering with work), there is only an implication in the *Fire Brigades Act* 1989 (NSW) and *Rural Fires Act* 1997 (NSW) based on the broad powers that is given to officers that forced evacuations are allowed. This, however, is still subject to interpretation as to whether these broad powers are sufficient to override the common law position that a person can freely enjoy her or his property rights unencumbered by the state and thus should not be forcibly evacuated when he or she has a pecuniary interest in the land, building or goods in question. It is noted however that the officer in charge may remove a person within a fire district under the *Fire Brigades Act* 1989 (NSW) but only if he or she is interfering with the work of the fire brigade.

D. Northern Territory

The *Fire and Emergency Act* 1996 (NT) gives powers to the Incident Commander and members of the FRS and police officer (if authorised to do so, or authority cannot be practicably obtained) to order a person to vacate land. The legislation however has not given any enforcement power to this order and so it could be implied that the legislation does not give power to the relevant emergency worker to use force to remove a person who fails to comply with order. The *Fire and Emergency Act* 1996 only makes it clear that a person can be removed if the person's presence interferes with the fire-fighting operations. The *Fire and Emergency Act* 1996 (NT) also makes it an offence to interfere and obstruct fire-fighting operations.

Only broad powers are given to the fire control officer or fire warden under the *Bushfires Act* 1980 to do 'any act' necessary for or incidental to protecting property and life. It is unclear whether forced evacuation can be implied by this provision. It is only clear during a state of emergency or disaster that emergency workers have the power to evacuate and remove people from the declared area. This however can only be done if the Administrator has declared that evacuation should occur over that particular area. At all other times, it is not clear if emergency workers may forcibly evacuate people from their homes during a bushfire.

E. South Australia

In both the case of a fire (generally) and when a state of emergency has been declared, statutory powers appear to privilege emergency response operations over pecuniary interests of owners. Emergency workers are given the power to 'remove' any person to a place the officer thinks fit during either of these times. They may also direct and prohibit the movement of persons and vehicles. In both instances, substantial fines of up to $20,000 are applicable should a person refuse to adhere to the instructions of an authorised fire and

emergency workers to be removed or be directed/prohibited (see Fire and Emergency Services Act 2005 (SA) s 42(4), 97(4) and s118(4), and *Emergency Management Act* 2004 (SA) s 28).

F. Tasmania

It is only clear in legislation that forced evacuations (in the exercise of 'emergency powers') are allowed to be carried out if it has been specifically authorised either by the State Controller or the relevant Regional Controller. There is no 'blanket' provision in the *Fire Services Act* 1979 (Tas) or the *Emergency Management Act* 2006 (Tas) that allows for forced evacuations. There is only an implication in the *Fire Services Act* 1979 (Tas) that forced evacuations are allowed based on the broad powers that is given to fire officers. It is, however, still subject to interpretation whether these broad powers are sufficient to override the common law position. Otherwise a person can only be removed if he or she is interfering with the operations of the brigade.

Police officers on the other hand may remove persons from land or premises that are on fire or being threatened even if they are not interfering with fire-fighting operations. This may be on the police officer's own accord or upon the request by the appropriate fire officers.

G. Western Australia

The Director of Operations, members of the fire brigade in charge and authorised officers of the Fire and Emergency Services Authority may order a person to withdraw from premises and may use reasonable force to ensure enforcement only when a 'rescue operation' is being carried out on the premises in gazetted fire districts under the *Fire Brigades Act* 1942 (WA). A 'rescue operation' is defined in section 4 of the *Fire Brigades Act* 1942 (WA) to mean 'the rescue and extrication of any person or property endangered as a result of an accident, explosion or other incident'. However, such an incident is not relevant to the policy context considered in this paper. Other than in 'rescue operations', legislation does not empower ESOs and their members to order people to leave or forcibly evacuate people. Emergency workers may, however, still remove persons interfering with operations of the fire brigade.

A bush fire control officer may exercise the same powers as the Director of Operations under the *Bush Fires Act* 1954 but only if it is 'necessary or expedient, for extinguishing a bush fire or for preventing the spread or extension of the fire' and an authorised Conservation and Land Management officer may also exercise the same powers of a bush fire control officer or bush fire brigade on or near Crown or forest land. Western Australia's SES and FESA units may restrict and prohibit movements of people and vehicles and to use reasonable force to ensure compliance but are not usually given the power to evacuate people in 'normal' emergency circumstances (as opposed to during a declared emergency situation or state of emergency).

Whether SES and FESA units (as well as other emergency workers) are able to evacuate people during declared emergencies will depend on whether they have been authorised to do so under section 61 of the *Emergency Management Act* 2005 (WA).

When an emergency situation or a state of emergency is declared over an area the hazard management officer, an authorised officer under section 61 of the *Emergency Management Act* 2005 (WA) and the most senior police officer present may not only direct the movements of people and vehicles in and around the emergency area, they may also direct the evacuation and removal of persons from the area. An authorised officer and the most senior police officer present many also remove any person who obstructs emergency management activities during a state of emergency.

H. Queensland

It is clear in Queensland that statutory powers privilege emergency response operations power over the pecuniary interests of owners. During a fire incident or when a disaster or emergency situation has been declared, authorised persons under the *Fire and Rescue Service Act* and *Disaster Management Act* may not only evacuate people and prohibit people from remaining in a specified area but are able to use reasonable force to ensure persons comply with orders to be evacuated or excluded from an area. There are only a couple of situations where the provisions of the *Disaster Management Act* are silent as to whether force may be used to ensure compliance. An authorised rescue officer under s100 of the *Disaster Management Act* and a person authorised by the Chairperson of the State group or a district disaster coordinator under section 110 of the *Disaster Management Act* may only *direct* a person to leave. The Act in these instances only provides that it is an offence to not comply and does not clearly give powers to the emergency worker to forcibly remove people.

Conclusion

The pecuniary interest evacuation model has been legislated in Victoria. However, it remains unclear whether it is still applicable within a declared emergency area, such as when conditions that were imposed on people in staying are breached. It is only in South Australia and in most situations in Queensland that the mandatory evacuation model (where force may be used to remove unwilling persons) clearly applies. In Tasmania, the mandatory evacuation model only applies in relation to police powers to evacuate, which means

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In Queensland authorised persons may not only evacuate people, they may also use reasonable force to ensure people comply with orders.

only the police in Tasmania have the powers to use force (that is as reasonably necessary) to remove persons who are on land or premises that is burning or threatened by fire. Forced evacuations are also allowed in NSW, Northern Territory, Western Australia when a state of emergency or disaster is declared. In Tasmania, forced evacuations can only be carried out if authorised by the state controller or the relevant Regional Controller.

It is not clear whether the mandatory evacuation model applies in other contexts. Emergency workers are often given the power to *direct* people to leave and legislation may even make it an *offence to disobey* such directions but stops short at giving ESOs and their members the power to *use force* in removing people (see for example in ACT, Northern Territory). The power to use force in removing people is often restricted to when the person's presence is interfering with brigade operations (see for example in ACT, NSW, Northern Territory, Tasmania, Western Australia). Further, emergency workers in some jurisdictions (such as NSW, Northern Territory, Tasmania, Western Australia) are given broad powers to act but it is unclear whether this translates to being able to use force to remove people from their homes as this would be considered assault and battery and at odds with the common law favouring the recognition of people's pecuniary interests. Therefore, though there are clear contexts when the pecuniary interest evacuation model or the mandatory evacuation model exists, there are many other situations where it is ambiguous which model (if any) applies.

Nevertheless, even if clear powers to evacuate exist, it is important to remember that the decision to use one's power to evacuate is a *choice* and must be considered carefully as it is often an onerous, costly and dangerous task. Therefore, prior to exercising their evacuation powers, ESOs and their members should ensure that they have carefully considered their decision to evacuate (such as whether it is in accordance with the well-accepted 'Prepare, Stay and Defend or Leave Early' policy) and then to exercise their powers to the extent as provided for by legislation.

Bibliography

Articles

Handmer J. and Tibbits A., (2005) "Is staying at home the safest option during bushfires? Historical evidence for an Australian approach" 6 *Environmental Hazards* 81.

Kanarev N., (2001) "Assessing the legal liabilities of emergencies" Autumn, *Australian Journal of Emergency Management* 21.

Cases

Balfour v Balfour [1919] 2 KB 571.

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